87-2118

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ AND WENCESLAO GUTIERREZ, JR.,
Appellants

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,
Appellees

On Appeal From the United States District Court of the Southern District of Texas

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JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALEXANDER M. ROJAS, ET AL.,

Appellants

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Whether the district court improperly denied declaratory and injunctive relief under Section 5 of the Voting Rights Act in finding that a legislative change in local policy governing the agenda preparation for Board meetings which grants one member of the Board as President discretionary powers to subject remaining Board members to an

arbitrary limitation of their individual powers and duties as elected representatives from both single-member district and at-large positions, in contravention of state law and state policy, was not a change affecting voting within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

2. Whether the district court improperly denied declaratory and injunctive relief under §5 of the Voting Rights Act, 42 U.S.C. §1973c,1 in finding that the challenged policy change was not within the scope of the Act because it was racially neutral and had never been applied even though the court found that the policy has potential for discriminatory application.

LIST OF ALL PARTIES INVOLVED

The caption of the case in this Court contains the names of all parties involved in this proceeding.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	v
Opinion Below	vii
Statement of Jurisdictional Grounds.....	vii
Statutory Authorities	ix
Statement of the Case	1
A. Facts Material to Case	1
B. Opinion of Lower Court	7
Substantiality of Questions Presented	11
Conclusion	22
Appendix:	
Opinion of the District Court	1a
Judgment of the District Court	8a
Notice of Appeal by Appellants	10a

Page

Texas Open Meetings Act 12a

Letter from Reynolds to Null 14a

TABLE OF AUTHORITIES

Cases	Page
Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 1 (1969)	11-16, 19-20
Dougherty County Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978)	14
Fairley v. Patterson, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969)	13
Hardy v. Wallace, 605 F.Supp. 174 (N.D.Ala. 1985)	8,16-17
NAACP v. Hampton County Election Com'n, 470 U.S. 166, 105 S.Ct. 1128, 84 L.Ed. 2d 124 (1985)	14-15, 20-21
Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed 476 (1971)	13
Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964)	13
Rojas V. Victoria Independent School District, No. V-87-16 (S.D. Tex. March 29, 1988)	passim
State of South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769	11
United States v. Board of Commissioners, 435 U.S 110, 78 S.Ct. 965, 55 L.Ed.2d 148 (1978)	13

Cases	Page
United States v. Victoria Independent School District, No. V-86-17 (S.D. Tex. November 14, 1986)	1,3-4, 6
Federal Statutes:	
42 U.S.C. §1973c	passim
42 U.S.C. §1973l(c)(1)	12
Code of Federal Regulations	
28 C.F.R. §51.13	8
State Statutes	
Tex. Educ. Code Ann. tit. 2, §23.024 (Vernon) (1987)	2
Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, Sec.3A(a) (Vernon) (1988 Supp.)	10

OPINION BELOW

The opinion by the lower court remains unreported. The lower court's opinion and Judgment are appended hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

Appellants, Alexander M. Rojas, Theresa Gutierrez, Ruben Caraveo, Terri Perez and Wenceslao Gutierrez, Jr., bring this appeal from a Judgment of the United States District Court for the Southern District of Texas, Victoria Division, denying Appellants' request for declaratory judgment that the change in the school district's agenda preparation policy embodied in policy BE (LOCAL) is a change affecting voting subject to requirements of §5 of the Voting Rights Act of 1965, 79 Stat. 439 (1965) as amended, 89 Stat. 402, 42 U.S.C. §1973c (Supp.1981), and injunctive relief as to the implementation of that policy. The Judgment was entered on March 29, 1988, by the

United States District Court for the Southern District of Texas, Victoria Division, sitting as a three-judge court under the requirements of 42 U.S.C. §1973c, as amended. On April 27, 1988, Appellants filed in that court a Notice of Appeal, a copy of which is attached hereto. (See Appendix p.10a). Jurisdiction is vested in this Court under the Voting Rights Act of 1965, 42 U.S.C. §1973c (Supp.1981).

Appellants submit that this Court has jurisdiction over the questions on appeal since said statute provides for direct appeal to this Court. The questions on appeal are of such a substantial nature as to require plenary consideration by this Court.

STATUTORY AUTHORITIES

Voting Rights Act. 42 U.S.C. §1973c(1975):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in Section 1973b(a) of this title based upon determinations under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or

whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure:

Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may

reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

A. Facts Material to Case

Victoria Independent School District, under the laws of the State of Texas, is governed by a seven member Board of Trustees. Prior to February 14, 1985, Victoria Independent School District maintained an at-large system of elections featuring numbered places and staggered terms of office for all positions. A change in election systems was undertaken in early 1984 pursuant to new state law enacted in 1983, to avoid the possibility of litigation. United States v. Victoria Independent School District, No. V-86-17 (S.D. Tex. November 14, 1986.) [1] At public hearings on the election

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[1] Prior to August 29, 1983, state law applicable to most Texas school districts required at-large elections. In its first session following the 1982 amendment of the voting Rights Act, the Texas legislature enacted a new law permitting 70% or more

(Footnote Continued)

system, the Mexican American community had strongly opposed inclusion of any at-large positions and inclusion of any restrictive features for at-large positions. On February 14, 1985, Victoria Independent School District received preclearance for the implementation of a new election system which incorporated five single-member districts and two at-large positions. Thereafter, on April 5, 1985, elections were held under the new system for all positions. A numbered place requirement for the at-large positions, not part of the precleared plan, was implemented.

As a result of the elections, Theresa Gutierrez, was elected as the only Mexican American on the Board, from a single-member district with a 51.4% Hispanic population and a 14% Black population. No other Mexican American has subsequently

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(Footnote Continued)
of the trustees to be elected by single-member districts. Tex. Educ. Code Ann. tit. 2, §23.024 (Vernon) (1987)

been elected to the Board. No other female served on the Board during the period of April 1985 through April 1987.

After efforts to secure the submission of the numbered place feature, the United States of America filed suit against Victoria Independent School District in April of 1986, to enforce Section 5 of the Voting Rights Act as to the numbered place requirement.

During the pendency of the action filed by the United States, a group of Mexican American individuals, including three of the Plaintiffs before this Court as Appellants, requested Plaintiff-Intervenor status on behalf of the Mexican American voters. The group was granted amicus curiae status for briefing and oral argument. The three individuals included Alexander M. Rojas and Terri Perez, close associates of Mrs. Gutierrez, and Wenceslao Gutierrez, Jr., Mrs. Gutierrez' husband.

Six days after the court's decision against the district in United States v. Victoria Independent

School District, No. V-86-17 (S.D. Tex. November 14, 1986), on November 20, 1986, the Board of Trustees on a six to one vote adopted policy BE (LOCAL) which provided that depending on the nature of the items submitted the President of the Board may require approval of two Board members to secure placement of an item on the Board agenda. Mrs. Gutierrez voted against the policy.

Prior policies followed by the Board were developed by the Texas Association of School Boards and allowed any member of the Board to request an item be placed on the agenda for the open business meetings of the Board. The policy initially proposed for adoption required any two members of the Board request that an item be placed on the agenda for Board meetings.

On February 27, 1987, the Department of Justice notified the school district that the policy change requiring two members of the Board to request an item be placed on the agenda for Board meetings should be submitted for preclearance. The

Department explained that in the context of the newly effective single-member district plan, the change in policy had a significant impact on the nature and character of the representation that voters could expect from their individually elected representative. (Appendix pp. 14a-15a)

The school district responded on March 10, 1987, that the Department had received erroneous information on the policy actually adopted, and did not submit for preclearance the policy for agenda preparation actually adopted on November 20, 1986. Subsequently on March 23, 1987, Mexican American plaintiffs filed this action for declaratory and injunctive relief under Section 5 of the Voting Rights Act as to the school district's change in policy for agenda preparation and as to the use of ballot language of instruction to voters ("Vote for Two") which effectuated an anti-single shot voting requirement in the court-ordered special election for

at-large positions on the Board. [2] The proceedings of this action are primarily depicted through the documents filed by the parties in the action. In accordance with an order of the district court, parties filed briefs and stipulations of facts relevant to the questions presented. By order of the district court, discovery was restricted. In lieu of an evidentiary hearing the district court provided an opportunity for oral argument following the culmination of the briefing schedule in the case. At oral argument, Plaintiffs sought and secured admission of additional evidence in the record. Through briefs filed and in subsequent oral argument, Plaintiffs/ Appellants raised questions for which they now seek review.

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[2] The ballot language portion of this lawsuit was severed and joined with the earlier action filed by the United States against Victoria Independent School District, United States v. Victoria Independent School District, Civil Action No. V-86-17, by order of the district court on March 31, 1987.

B. Opinion of Lower Court

The question before the three-judge court was whether §5 preclearance review of policy BE(LOCAL) is required. The lower court primarily focused on the subsumed question of whether the change in Board policy for agenda preparation was a change "affecting voting," and briefly on whether the change was discriminatory. Opinion pp. 2,4, Rojas v. Victoria Independent School District, No. V-87-16 (S.D. Tex. March 29, 1988)(See Appendix pp.3a,5a-6a) (hereinafter cited as Rojas v. Victoria I.S.D.) The unanimous opinion found that the modifications of powers of trustees effectuated by the policy were inconsequential and beyond the scope of §5. It further found that the powers of board members exist only in the context of the board as a collective body and that the minor alteration of procedure effected by the policy did not impact on the manner in which the board reaches collective decisions. The lower court also

determined that the change did not single out Trustee Gutierrez and had not been applied to her disadvantage, but that discriminatory application would be subject to legal challenge.

The district court first determined that the challenged policy was beyond the actual election process itself and beyond the examples listed by the Attorney General at 28 C.F.R. §51.13. The court also concluded that under Hardy v. Wallace, 605 F.Supp. 174 (N.D. Ala. 1985), routine legislative modification of duties or authority of elected officials were beyond the scope of §5. Therefore, the "miniscule" effect of the policy change on the powers of Victoria trustees the court found was beyond the farthest reaches of the scope of §5. Opin. p.2, Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex. March 29, 1988) (Appendix p.4a). [3]

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[3]State policy requires and previous board policy allowed all individual members of the governing body to have equal authority in development of public business meeting agendas.

The court below then disposed of the question of the effect of the policy on powers of trustees by determining that any such power exists only in the context of the board acting as a collective body. This approach required the Court to focus only on the effect of the change in the context of collective actions by the board when constituted as a body. Thus, the court concluded that "only a significant alteration of parliamentary procedure could effect the manner in which [the board] comes to its collective decision." Opin. p. 3, Rojas v. Victoria I.S.D., No. V-87-16 (March 29, 1988) (Appendix p.4a). The procedural change effected by the policy was of "de minimis import," merely advancing the time for a second before bringing the issue to the board, similar to requirements of standard parliamentary procedure. [4] Opin. p.3, Rojas v.

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[4]The record below contains minutes of board meetings for April 1985 - July 1987, showing that a very modified parliamentary procedure under which (Footnote Continued)

Victoria I.S.D., No. V-87-16 (March 29, 1988) (Appendix p.4a-5a).

The lower court concluded that the policy was not directed to Trustee Gutierrez because any board member could be affected by the policy and it had never been applied to her disadvantage. Furthermore, the court found the ability of Trustee Gutierrez to procure a second for or succeed in an action before the collective body was in no way affected. Therefore, although also finding that discriminatory application of the policy was possible and would be legally challengeable, the court concluded that the Voting Rights Act was not concerned with matters like policy BE(LOCAL).

(Footnote Continued)
discussion or debate on an agenda subject may supercede a motion on the matter is used in conducting business. The Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, Sec. 3A(a). (Vernon) (1988 Supp.), the controlling authority for conduct of business by a governing body, limits any discussion, deliberation or decision of the body to the subjects listed in the notice to the public of the agenda for a public meeting.

SUBSTANTIALITY OF QUESTIONS PRESENTED

The questions presented are so substantial as to require plenary consideration.

A. The starting point for analysis of the Victoria school district agenda preparation policy, BE(LOCAL), is the historical development of the judicial interpretation of the scope of §5 of the Voting Rights Act, "to determine whether in light of articulated purposes of the legislation, Congress intended that the statute apply to the particular case in question." Allen v. State Board of Elections, 393 U.S. 544, 570, 89 S.Ct. 817, 834, 22 L.Fd 1,20 (1969).

Beginning with State of South Carolina v. Katzenbach, 383 U.S. 301, 334-355, 86 S.Ct. 803, 822, 15 L.Ed 769, 790 (1966), which upheld the constitutionality of the Voting Rights Act, the Supreme Court early on recognized and affirmed the intentions of Congress, based on historical experience, to enact an exceptional, broad

legislative measure through §5 that would continually evolve to address the extraordinary stratagems states might develop to evade the remedies to voting discrimination contained in the Act or imposed by the federal courts.

Subsequently, in Allen v. State Board of Elections, the Supreme Court's first decision construing Section 5, it examined the legislative history of the Act and concluded the intentions of Congress were that §5 be given the "broadest possible scope." Allen, supra, 393 U. S. at 567, 89 S.Ct. at 832, 22 L.Ed.2d. at 17-18. The Court concluded further that Congress intended for the act to respond to "the subtle as well as the obvious state regulations which have the effect of denying citizens the right to vote." Allen, supra, 393 U.S. at 565, 89 S.Ct. at 831-832, 22 L.Ed.2d at 17. "[T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. §1973l(c)(1) (1964 ed., Supp. I). See

Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964)." Id. In his separate opinion, Justice Harlan confirmed the Court's position, by stating of the opinion,

> The Court, however, goes further to hold that a State covered by the Act must submit for federal approval all those laws that could arguably have an impact on Negro voting power, even though the manner in which the election is conducted remains unchanged.

Allen, supra, 393 U. S. at 583, 89 S.Ct. at 840, 22 L.Ed.2d at 27. Concurrently with Allen, the Supreme Court observed in Fairley v. Patterson, 393 U.S. 544, 569, 89 S.Ct. 817, 833, 22 L.Ed. 2d 1, 18 (1969), that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."

In the subsequent cases of Perkins v. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971) and United States v. Board of Commissioners, 435 U.S. 110, 78 S.Ct. 965, 55 L.Ed.2d 148 (1978), the Court reexamined and confirmed its prior decisions that comprehensive

coverage of §5 was intended by Congress as protection against dilution of voting power.

As the court concluded in Dougherty County Board of Education v. White, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed. 2d 269 (1978), the reenactment of §5 by Congress in 1970 and 1975 without substantial modification, although considering both Allen and Perkins extensively, clearly demonstrated approval of the broad construction given §5 by the Court. More recently the Supreme Court concluded that Congress again specifically endorsed the broad interpretation of §5 when it extended the Voting Rights Act in 1982. NAACP v. Hampton County Election Com'n., 470 U.S. 166, 176, 105 S.Ct. 1128, 1134, 84 L.Ed.2d 124, 133 (1985). The judicial precedent of §5 interpretation clearly establishes that effectuation of the purposes of the Act will continue to include within the scope new, unparalleled changes which when analyzed in the context of the specific facts may have potential for adverse impact on voters. See, NAACP, supra, 470

U.S. at 176-177, 105 S.Ct. at 1134-1135, 84 L.Ed.2d 133-134. See also, 470 U.S. at 176, n.21, 105 S.Ct. 1134, n. 21, 84 L.Ed.2d at 134, n.21.

The district court's conclusion that the change in the agenda preparation policy was not a discriminatory change within the purview of §5 runs counter to the intentions of Congress as has been repeatedly affirmed by the Supreme Court. The clear principle that has emerged from Allen and its progeny as to the coverage scope of §5 is that the key inquiry is whether a challenged change is one affecting the power of voters. The lower court did not address the effects of the change in the agenda preparation policy in terms of its impact on voters, vis a vis the effectiveness of representation provided voters by trustees. Rather, the court addressed its impact on the powers of trustees under the limited scope of their ability to accomplish collective action under standard parliamentary procedure.

The three-judge court first states that the change in policy is outside examples listed in the regulations developed by the Attorney General and the election process itself. Then apparently concluding the policy change was a routine modification of power, the court relied on Hardy v. Wallace, supra, 603 F.Supp. at 179, to conclude that "routine or ordinary legislative modification of the duties or authority of elected officials," is probably beyond the reach of §5 "even given its broadest interpretation." Opin., p. 2. Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex. March 29, 1988 (Appendix p.3a).

The approach taken by the district court in examination of the facts of this case and, thus, conclusions reached run completely counter to the holdings in Hardy and the purposes of §5. The court in Hardy v. Wallace determined under guidance of Allen and its progeny that the relevant attribute of the change was its effect on voters. Supra, 603 F.Supp. at 178. Therefore, the Hardy

court examined the legislated change in authority for the appointment of members to the county racing commission from the legislative delegation to the governor in terms of the effect on the power of county voters and their effective representation, not its impact on the legislative delegation alone. Similarly, the relevant attribute of the change in the agenda preparation policy is its effect on the power of voters and the effectiveness of representation provided to voters, particularly of single-member districts. Unlike the Hardy court, the district court here reviewed in a vacuum the impact of the change on trustees. The lower court's inquiry should not have stopped with an examination of the modification of the powers of trustees functioning as members of a collective body to reach collective decisions under standard parliamentary procedure strictures, but should have examined the modification with respect to the powers of trustees in terms of their ability to

function as effective representatives for voters.[5]

In the context of the actual procedural process used in conducting business by the Victoria school board, the effectiveness of representation provided voters from single-member districts is substantially compromised by a policy that may allow an elected representative to address issues of direct concern to his/her constituents only with the approval of another member elected by a totally different constituency. Additionally the power of voters, from single-member districts particularly, is diluted when one member of a seven member board, elected by different constituencies, is granted a discretionary power to virtually control what issues of interest will be presented in public board meetings. Such a policy has the potential to completely thwart

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[5]As noted supra at n.4, the Victoria school board does not conduct business under standard parliamentary procedure. Therefore, conclusions of the lower court based on the assumed use of that process are not supported by the record, and are, in fact, contrary to the record.

the purpose for which single-member districts are traditionally implemented, that of providing effective representation to segments of a community, in particular minority communities. Clearly, under the historical and peculiar facts of this case the court should have found that the challenged policy is a change affecting voters within the scope of §5.

The district court's determination that the policy change did not trigger §5 application repeatedly emphasized the inconsequential nature of the change. The court concluded in separate sections of its opinion that the policy change had a "miniscule" effect on the powers of trustees and that the procedural change effectuated by the policy was one of "de minimis import." Opin.pp. 2,3, Rojas v. Victoria I.S.D., No. V-87-16, (S.D. Tex. March 29, 1988)(See Appendix pp.4a,5a).

The district court's characterization of the change in diminutive terms does not operate to exclude the change from §5 application. In Allen, the Supreme Court specifically found all changes no

matter how small were intended by Congress to "be subjected to §5 scrutiny." Allen, supra, 393 U.S. at 568, 89 S.Ct. at 833, 22 L.Ed 2d at 19; NAACP, supra 470 U.S. at 175-176, 105 S.Ct. at 1136, 84 L.Ed.2d 132. (1985).

The holding by the Court below demonstrates the need for a reaffirmation of the clear message of the federal courts and Congress that §5 be given the broadest possible scope in order to combat new and subtle subterfuges to voting power. While not a standard §5 change, the agenda preparation policy for Victoria school district has a very real effect on the power of the voters, particularly those from single-member districts, substantially diluting the effectiveness of their representation and thus their power. The district court has made a fundamental error in finding that the policy is not a change affecting voting within the scope of §5 and that no preclearance is required.

B. The conclusions of the court below that policy BE (LOCAL) is outside the application of §5

because the policy is facially neutral and has never been applied to Trustee Gutierrez' disadvantage runs counter to the Supreme Court's holding in NAACP. It is not within the purview of this district court to determine whether the changes at issue "in fact resulted in impairment of the right to vote, or whether they were intended to have that effect." NAACP, supra, 470 U.S. at 181, 105 S.Ct. at 1137, 84 L.Ed.2d at 136. That determination is "reserved by statute to Attorney General or to the District Court of the District of Columbia." Id. The inquiry of the Rojas court was limited to whether the "challenged alteration has the potential for discrimination." Id.

The district court very clearly recognized that the change in policy for agenda preparation has the potential for discrimination. In fact the court specifically noted that although the policy had never been applied to any measure, "the legality of a discriminatory use of the President's discretionary power would be an entirely different case." Opin.

p.4, n.5, Rojas v. Victoria Independent School District, No. V-87-16 (March 29, 1988) (Appendix p.6a,n.5).

Therefore, the district court's determination that the policy change did not require §5 preclearance because it was facially neutral and had not been applied to the disadvantage of the one Mexican American representative on the Board was clearly erroneous.

CONCLUSION

In this case probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDICES

		Page
A.	Opinion and Judgment, dated March 29, 1988	1a
	Opinion	1a
	Judgment	8a
B.	Notice of Appeal to the Supreme Court of the United States	10a
C.	Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, Sec. 3A(a)	13a
D.	Letter from Wm. Bradford Reynolds to M.L. Null, dated February 27, 1987	14a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

Before GEE, Circuit Judge, and KAZEN and HEAD, District Judges. GEE, Circuit Judge:

OPINION

Plaintiffs complain of a school board policy governing the procedure for placing issues on its meeting agenda, asserting that its adoption by the board constituted a change in procedure affecting voting so as to require preclearance by the Attorney General of the United States under Section 5 of the Voting Rights Act. The relevant facts are not disputed. Something over a year after the plaintiffs Theresa Gutierrez was elected to the board, the contested policy was adopted. The policy permitted the President of the board, in his discretion, to require the consent of two members for placement of a given item on the board's meeting agenda.[1] Mrs. Gutierrez contends that the

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[1] An earlier proposed version, ultimately replaced by the version in question, would have required two members' consent in every instance. Earlier still, at the time of Gutierrez' election, the request of one member sufficed.

policy diminishes the powers of her position after the fact of her election, she being the sole representative of the Hispanic community on the seven-member board.[2]

The central question debated by the parties is whether the policy change is one "affecting voting" so as to require the Attorney General's clearance. To be sure, it clearly lies beyond the actual election process itself and beyond those actions listed by the Attorney General in the example given at CFR §51.13. [3] Ordinary, routine legislative modification of the duties or authority of elected officials have been held to be probably beyond the reach of section 5, "even given its broadest interpretation." Hardy v. Wallace, 603 F.Supp. 174,

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[2]She is one of five trustees elected from single-member districts, two others being elected at-large.

[3]These include such matters as changes in voters qualifications, in election procedures, and in candidates' eligibility.

179 (N.D. Ala., W.D. 1985). Whatever the farthest reach of the Act might be, we are convinced that the policy before us does not come within its scope. Its effect on the powers of the elected trustees was at most miniscule.

As the plaintiffs' brief correctly notes:

> Under Texas law, a Board of Trustees of a school district constitutes a body corporate and has the exclusive power to manage and govern the school district. §23.26, Tex. Ed. Code. The authority of Board members exists only in context of the Board functioning as a body in an official meeting. No individual board member may exercise authority with respect to the operation of schools or services of school employees by virtue of his status as a Board member. Toyah I.S.D. v. Pecos-Barstow I.S.D., 466 S.W. 2d 377, 380 (Tex.Civ.App.-San Antonio, 1971, no writ); Buchele v. Woods, 528 S.W. 2d 95 (Tex.Civ.App.-Tyler, 1975, no writ).

Thus it necessarily follows that, because the only powers exercised by the board are exercised as a body, only a significant alteration in parliamentary procedure could affect the manner in which it comes to its collective decisions. Standard parliamentary

procedure requires a second to bring any matter before such a body for discussion, and the "new" procedure complained of does no more than permit the board presiding officer, in his discretion, to require a second before entering the issue on the agenda to begin with. Thus, at most, the effect of the challenged change is to advance the time at which a second becomes requisite to drawing a matter before the board. Try as we may, we are simply unable to conceive of this as an alteration in procedure of more than de minimis import.[4] It seems plain to us that if Mrs. Gutierrez is unable to persuade even one other trustee to join her in placing a matter on the board's agenda, she would have had no better success in procuring a second

---

[4]The circumstances that the President need not require a second in every case is somewhat more troubling, but it is amply apparent that, while his failure to do so may sometimes lead to the board's discussing a matter which only one trustee wishes to discuss, it will never lead to the board's taking any action supported by only one of its members.

should she have moved it at a meeting -- let alone in collecting the four votes required to pass it. The measure in no way singles her out for unfavorable procedural treatment -- any other trustee can be required to produce a second to get his matter on the agenda -- and there is no showing that it has ever yet been applied to her disadvantage. [5] As for substance, and procedure aside, she finds herself only one among seven -- compelled to enlist allies on the board if her views are to prevail. That, however, is not a a matter with which the Voting Rights Act concerns itself. Judgment will be for the defendants.

---

[5] At the hearing it was conceded that in fact it has yet to be applied to any measure. The legality of a discriminatory use of the President's discretionary power would be an entirely different case. See Yick Wo v. Hopkins, 118 U.S. 356 (1886).

/s/
Thomas Gibbs Gee
United States Circuit Judge

/s/
George P. Kazen
United States District Judge

/s/
Hayden W. Head, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

JUDGMENT

For the reasons detailed in an opinion accompanying this judgment, it is DECLARED and ORDERED that adoption of a policy that, at the president's discretion, approval of two board

members could be required to place an item on the agenda of the Victoria Independent School Board does not constitute a change affecting voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. §1972c, requiring preclearance from the United States Department of Justice. This case is therefore DISMISSED at Plaintiffs' cost.

DONE this 29th day of March, 1988.

HONORABLE THOMAS C. GEE

HONORABLE HAYDEN W. HEAD, JR.

HONORABLE GEORGE P. KAZEN

BY: GEORGE P. KAZEN /s/

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ, and WENCESLAO GUTIERREZ, JR.,	§	
Plaintiffs,	§	
V.	§	CIVIL ACTION NO. V-87-16
VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, VICTORIA INDEPENDENT SCHOOL DISTRICT; and VAL HUVAR, County Clerk, County of Victoria,	§	
Defendants.	§	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alexander M. Rojas, Theresa Gutierrez, Ruben Caraveo, Terri Perez, and Wenceslao Gutierrez, Jr. plaintiffs above

named, hereby appeal to the Supreme Court of the United States from the final order denying Plaintiffs' request for declaratory and injunctive relief against Victoria Independent School District under Section 5 of the Voting Rights Act entered in this action on March 29, 1988.

This appeal is taken pursuant to 42 U.S.C.A §1973c.

DATED: April 26, 1988

Respectfully submitted,

ANTONIA HERNANDEZ
NORMA V. CANTU
JUDITH A. SANDERS-CASTRO
ALBERT H. KAUFFMAN
JOSE GARZA
Mexican American Legal Defense
and Educational Fund
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LOCAL COUNSEL:

JUAN GONZALEZ
702 Artesian
Corpus Christi, TX 78401
(512) 887-7887

/s/
JOSE GARZA
Attorney in charge for
Plaintiff-Intervenors

CERTIFICATE OF SERVICE

I, Jose Garza, do hereby certify that I have mailed a true and correct copy of the foregoing Plaintiff-Intervenors NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on this 27th day of April, 1988 certified return receipt requested to the following Attorneys of Record:

Christopher Lehmann
Attorney Voting Section
Civil Rights Division
U. S. Department of Justice
10th & Constitution Ave., N.W.
Washington, D. C. 20530

M. L. Null, Esq.
P. O. Box 1969
Victoria, TX 77902

Anderson, Smith, Null & Stafer
One O'Connor Plaza
Seventh Floor
Victoria, TX 77901

/s/
JOSE GARZA
Attorney for
Plaintiff-Intervenors

APPENDIX C

TEX. OPEN MEETINGS ACT

Tex. Rev. Civ. Stat. Ann. art. 6252-17,
Sec. 3A(a) (Vernon) (Supp.1988)

Sec.3A (a) Written notice of the date, hour, place, and subject of each meeting held by a governmental body shall be given before the meeting as prescribed by this section. The requirement for notice prescribed by this section does not apply to matters about which specific factual information or a recitation of existing policy is furnished in response to an inquiry made at such meeting, whether such inquiry is made by a member of the general public or by a member of the governmental body. Any deliberation, discussion, or decision with respect to the subject about which inquiry was made shall be limited to a proposal to place such subject on the agenda for a subsequent meeting of such governmental body for which notice has been provided in compliance with this Act.

APPENDIX D

WBR:SSC:YDW:gmn
DJ 166-012-3
R7167

February 27, 1987

M. L. Null, Esq.
Anderson, Smith, Null & Stoter
P. O. Box 1969
Victoria, Texas 77902

Dear Mr. Null:

It has come to our attention that the Victoria Independent School District, Victoria County, Texas, formally has adopted a new procedure that prohibits an individual member of the board from presenting issues for the board's consideration. As we understand board policy prior to November 20, 1986, any member of the board could request that an item be placed on the agenda for board meetings. We are informed that the policy now has been changed to require that "[a]ny two members of the Board of Trustees may request...that an item or items be placed on the agenda for Board Meetings."

In our view, this change in policy would seem to have a significant impact on the nature and character of the representation that voters can expect from their individually elected representative under the newly effective single-member district plan and, thus, that the change involves a "standard, practice, or procedure with respect to voting..." requiring preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. Our records fail to show that this change has been submitted to the United States District

Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the Victoria Independent School District plans to take with respect to this matter. Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgement from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the Procedures for the Administration of Section 5 (52 Fed. Reg. 493-495). If you have any questions, feel free to call Ms. Debora van der Weijdge (202-724-3182) of our staff. Refer to File No. R7167 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Gerald W. Jones
Chief, Voting Section

(2)

No. 87-2118

Supreme Court, U.S.
FILED
JUL 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ and WENCESLAO GUTIERREZ, JR.,

Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,

Appellees.

On Appeal From the United States District Court of the Southern District of Texas

MOTION TO DISMISS OR AFFIRM

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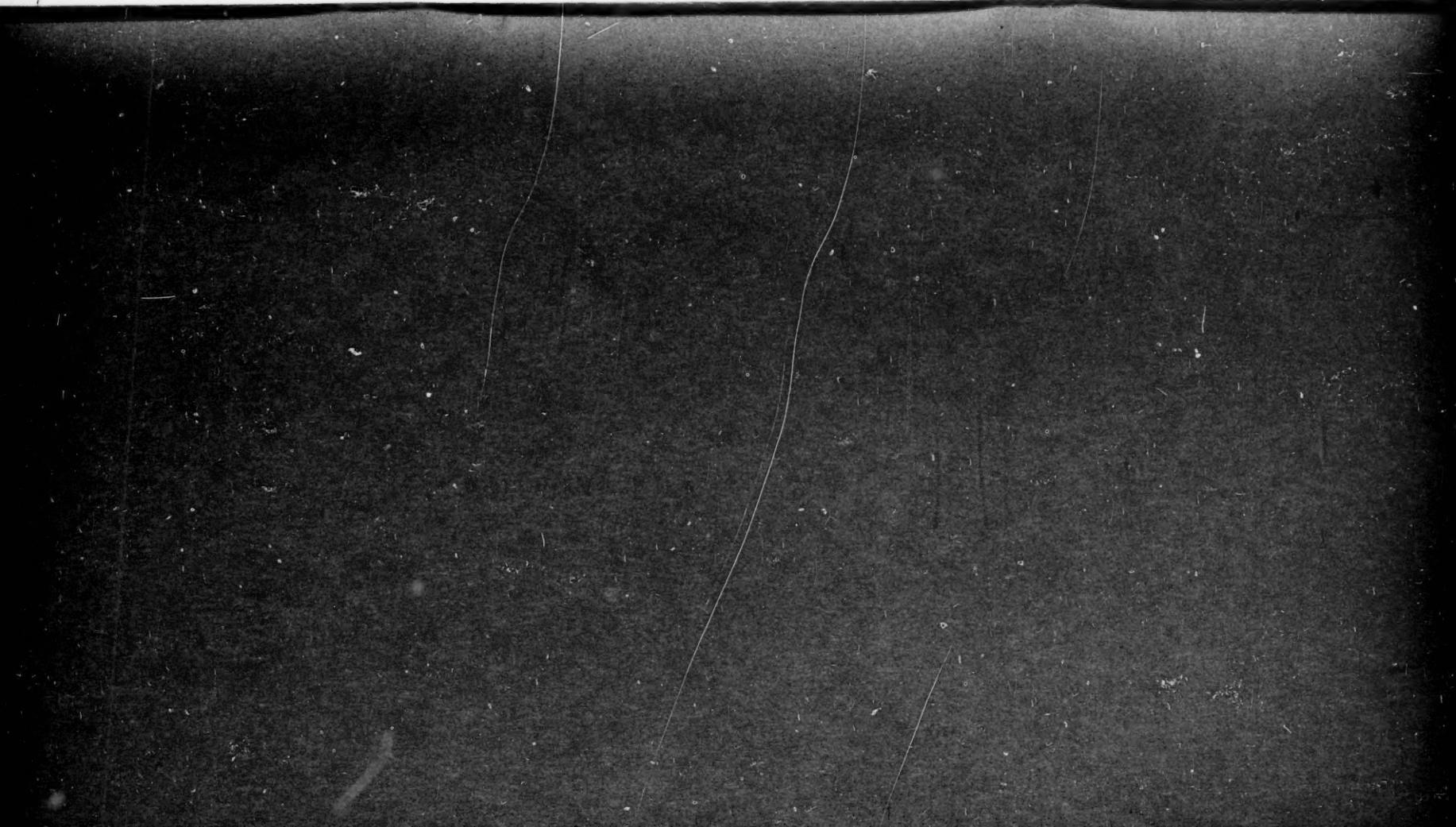

QUESTION PRESENTED

Appellees respectfully submit that the following question is the only one genuinely raised in this case:

> Whether the Victoria Independent School District Board of Trustees must seek approval under section 5 of the Voting Rights Act of an agenda preparation policy that permits the Board President to require the approval of two Board members to secure placement of an item on the agenda?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Motion to Dismiss or Affirm	1
Statement	2
Argument	3
Lack of Substantiality	5
Conclusion	6
Appendix:	
Victoria Board Policy BE(LOCAL)	1a
Letter from M. L. Null to Gerald D. Jones, Chief, Voting Section, Department of Justice, dated March 10, 1987	5a

TABLE OF AUTHORITIES

Page

CASES

Hardy v. Wallace, 603 F.Supp. 174 (N.D. Ala. 1985) 2, 3, 4

RULES

Revised Rules of the United States Supreme Court

Rule 15(h) 5

Rule 15(i) 4

Rule 16.1(c) 1

Rule 16.1(d) 1

REGULATIONS

Federal Register, Volume 52, No. 3, Tuesday, January 6, 1987 (p. 488) 4

No. 87-2118

In The

Supreme Court of the United States

October Term, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ and WENCESLAO GUTIERREZ, JR.,

Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,

Appellees.

On Appeal From the United States District Court of the Southern District of Texas

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) and (d) of the Revised Rules of this Court, appellees move that this appeal be dismissed, or alternatively, that the judgment of the District Court be affirmed.

STATEMENT

After several months of very lengthy meetings, sometimes involving items that had been on the agenda more than once and voted down, the Board of Trustees of Victoria Independent School District (hereafter "Victoria Board") changed their agenda preparation policy, first to one requiring the request of two trustees to place an item on the agenda, but later, after objection by some trustees, to one which permitted any trustee to place an item on the agenda unless the Board President, depending on the nature of the item submitted, required the approval of two board members. This board agenda preparation policy is carried in the Victoria Board policy book as BE (LOCAL) and can be found in the Appendix to this Motion, p. 1a. The Board agenda preparation provisions of BE(LOCAL) requiring the approval of two Board members for an agenda item have never been used by any Victoria Board president since the day of adoption, November 20, 1986. Thinking that BE(LOCAL) required, without exception, the approval of two Board members to place an item on the Board agenda, the Voting Section of the Attorney General's Office wrote to the general counsel for the Victoria Independent School District and suggested that BE(LOCAL) "would seem" to require section 5 preclearance. (Appendix to Jurisdictional Statement, p. 14a). In response the correct agenda preparation policy was sent to the Voting Section to help them in their consideration of whether it needed preclearance and the suggestion made that it did not rise to the level of reallocating authority among two different governmental authorities dealt with in *Hardy v. Wallace*, 603 F.Supp. 174 (N.D. Ala. 1985), which was the admitted case being looked at by the Voting

Section for possible preclearance of BE(LOCAL). The response to the Voting Section inquiry can be found in the Appendix to this Motion, p. 5a. Nothing further has been heard from the Voting Section in connection with BE (LOCAL), although they were apparently invited by the appellants to come into the case below and continue to be furnished copies of the plaintiffs' filings in this case.

ARGUMENT

This is a section 5 coverage case, and as such, is narrow in its scope and application. The appellants' theory of submitting the internal agenda preparation policy of a local board to preclearance is admitted to be a novel one. The appellants do not and cannot cite a single case holding or even hinting that internal board agenda preparation policies are changes in voting procedure or the election process and, thus, subject to section 5 approval procedures. Even a casual reading of the only case relied upon by appellants, other than historical development cases, for section 5 coverage (*Hardy v. Wallace,* supra) will show that case in no way deals with agenda preparation by a local board or any other housekeeping function of a local board or anything in anyway analogous to the local policies of a single board. Moreover, the Court in *Hardy* made a specific determined effort to limit that case solely to the facts of that case by stating:

> "We emphasize that our conclusions in this case are reached within the ambit of its peculiar facts. They should not be read to support a requirement of section 5 preclearance in the myriad of conceivable situ-

ations that are somewhat analogous but lack the attributes that we have expressly found to be determinative." (p. 179).

In connection with *Hardy* it should also be noted that the Attorney General has characterized that case as involving the issue of section 5 coverage to reallocation of authority among different governmental bodies. See Attorney General comments to the revised procedures for administration of section 5 at page 488 of the *Federal Register*, Volume 52, No. 3, Tuesday, January 6, 1987.

The three-judge court below found that the Victoria Board's agenda preparation policy, BE(LOCAL) was beyond the actual election process and apparently felt that this was so clear it did not even require case citations. The lower court further found that BE(LOCAL) was an ordinary, routine modification of the duties or authority of elected officials which was beyond the reach of section 5 since such modification was "miniscule", in fact, "de minimus". (See Jurisdictional Statement, Appendix p. 1a for the opinion of the district court.) No reason has been shown why this opinion should not be affirmed.

An additional, and equally substantial, reason for affirming the judgment below is the entire absence from the appellants' statement of any showing of abuse of discretion in the denial of injunctive relief below as required by Rule 15(i) of the Revised Rules of this Court.

LACK OF SUBSTANTIALITY

Generally, the way local boards prepare their agenda would not seem to be a substantial question, certainly it would not require plenary consideration, with briefs and oral argument for resolution by this Court.

Appellants have not followed the requirements of Rule 15(h) of the Revised Rules of this Court and presented reasons why the questions presented are so substantial as to require plenary consideration with briefs and oral argument. What appellants do is simply state that the "questions presented are so substantial as to require plenary consideration" (Jurisdictional Statement, p. 11) and then go into a long historical development of section 5 to try to show that the opinion below "was clearly erroneous." Obviously, the appellants do not agree with the opinion below, but that does not make the question dealt with in that opinion "so substantial as to require plenary consideration." The appellants' disagreement with the opinion below hardly suffices for what Rule 15(h) requires.

From this it is clear that the questions on which the decision of this case depends are so unsubstantial as to not need further argument.

———o———

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is, therefore, respectfully submitted that the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully submitted,

M. L. NULL
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(512) 573-9191

Attorneys for Appellees

APPENDIX

INDEX TO APPENDICES

A. Victoria Board Policy BE(LOCAL) 1a

B. Letter from M. L. Null to Gerald D. Jones, Chief, Voting Section, Department of Justice, dated March 10, 1987 ..... 5a

VICTORIA ISD 235902

BOARD MEETINGS	BE (LOCAL)
PLACE OF MEETING	Unless otherwise provided, Board meetings shall be held at the Education Center.
TIME OF MEETING:	Regular meetings of the Board shall be held on the third Thursday of each month at 4:30 p.m., unless otherwise provided by the Board.
SPECIAL OR EMERGENCY MEETINGS	The time for special and emergency meetings of the Board shall be as stipulated in the notice for the meeting.
AGENDA PREPARATION	The agenda for meetings of the Board normally will be closed at 5:00 p.m. on the seventh day preceding regular meetings and at noon on the third day preceding special meetings. Such requests shall be in writing and be sufficiently specific to inform other Board members and the public of the subject(s) to be discussed. The agenda shall be prepared under the direction of the Superintendent with the advice and consent of the President of the Board. Requests for agenda items may be made by any Board member. Depending on the nature of the items submitted, the President may require the approval of two Board members to secure placement of that item on the agenda.

The Superintendent must be notified of all agenda items.

NOTICE TO MEMBERS

Members of the Board shall be given notice of regular and special meetings at least seventy-two hours prior to the scheduled time of the meeting and at least two hours prior to the time of an emergency meeting.

EXECUTIVE SESSION

Notice of all meetings shall provide for the possibility of a closed or executive session during an open meeting, as provided by law. (See BEC)

ORDER OF BUSINESS

The order of business for regular Board meetings shall be as follows. The order of business may be changed by consent of a simple majority of all members present.

1. Roll call, establishment of quorum, call to order
2. Executive session(s), if any
3. Open forum
4. Reconvene in open meeting
5. Approval of Minutes of previous meeting(s)
6. Action items
7. Reports, discussion items
8. Adjournment

The Board may enter executive session at any time during the

	meeting, as permitted under the Open Meetings Act. (See BEC)
CALLED SPECIAL MEETINGS	The President of the Board shall call a special meeting at the President's discretion or on request by two or more members of the Board.
CALLING EMERGENCY MEETINGS	The president shall call an emergency meeting when the President or two or more members of the Board determine that an emergency or urgent public necessity warrants the meeting. Emergency meetings shall be callled only for bonafide emergencies which cannot reasonably be postponed until a special or regular meeting.
RULES OF ORDER	The Board shall observe the parliamentary procedures as found in *Robert's Rules of Order, Newly Revised,* except as otherwise provided in Board procedural rules or by law. Procedural rules may be suspended at any Board meeting by majority vote of the members present.
VOTING	Voting shall be by voice or show of hands, as directed by the President. Any member may abstain from voting and a member's vote or failure to vote shall be recorded upon that member's request. See BDAB (Local) for the Board President's voting rights.

MINUTES

Board action shall be carefully recorded by the secretary or clerk; when approved, these minutes shall serve as the legal record of official Board actions. The written minutes of all meetings shall be approved by vote of the Board and signed by the President and the Secretary of the Board.

The official minutes of the Board shall be retained on file in the office of the Superintendent and shall be available for examination during regular office hours.

DISCUSSIONS AND LIMITATIONS

Discussions shall be addressed to the President of the Board and then the entire membership Discussion shall be directed solely to the business currently under deliberation, and the Board President shall halt discussion that does not apply to the business before the Board.

The Board President shall also halt discussion if the Board has agreed to a time limitation for discussion of an item, and that time limit has expired. Aside from these limitations, the President shall not interfere with debate so long as members wish to address themselves to an item under consideration.

ADOPTED: 11/20/86

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March 10, 1987

Mr. Gerald W. Jones
Chief, Voting Section
DEPARTMENT OF JUSTICE
Washington, D. C. 20530

Re: Your File Nos. DJ166-012-3 and
R7167

THIS IS *NOT* A SECTION 5 SUBMISSION

Dear Mr. Jones:

Reference is made to your letter dated February 27, 1987, concerning the Agenda Preparation Policy of the Victoria Independent School District.

The first paragraph of your letter refers to a new procedure of the Victoria District that prohibits an individual member from presenting agenda items and then quotes from that policy. In response to this paragraph, I would like to point out that no such procedure has been adopted and that the policy you quote from has never been adopted by the Victoria Board. The policy you quoted from was adopted by the Victoria Board on first reading on October 23, 1986, but was not adopted on second reading at the next Board meeting on November 20, 1986, and is not a policy of the Victoria District. From an administrative standpoint, it is felt that you should consider the precise Agenda Preparation Policy of the Victoria District before any determination is made with reference to preclearance pursuant to Section 5.

To help you in your consideration of the actual Agenda Preparation Policy of the Victoria Board, I am attaching to this letter a statement by the Victoria District's Superintendent, Dr. Larry R. Vaughn, which discusses such policy and the reason for the policy and also attaches actual copies of the policy as first proposed and as finally adopted.

From a legal standpoint, I would like to add that I agree with the comments of the Attorney General in the Tuesday, January 6, 1987, *Federal Register,* Page 488, that the case of *Hardy v. Wallace,* 603 F.Supp. 174 (N.D. Ala. 1985) and the cases cited after that citation involves the issue of reallocation of authority among different governmental bodies. It seems clear that agenda preparation by a local school board does not rise to the level of reallocating authority among two different government bodies.

Please let me hear from you after the reconsideration proposed herein.

Very truly yours,

M. L. Null

MLN:bhs
Enclosure

cc: Dr. Larry R. Vaughn, Superintendent
VICTORIA INDEPENDENT SCHOOL DISTRICT
Post Office Box 1759
Victoria, Texas 77902

DATE: March 3, 1987

TO: M.L. Null

FROM: Larry R. Vaughn

SUBJECT: Response to Your Letter and to the Inquiry from the Justice Dept.

In response to the inquiries from the Justice Department, I shall attempt to describe what I believe to be the Board's intent in the policy that was adopted on October 23, 1986. In order to establish the history of that policy before explanation, the following is offered. The policy was submitted to the Board for first reading on October 23, 1986. A copy of that proposed policy is attached. (See exhibit #1.) During the Board meeting one Board member raised objections to the portion of the policy which stated that it takes two Board members to place an item on the agenda. After discussion a question was called and by a vote of 6 to 1 approved that policy on first reading but suggested changes be made in order to soften the language which made it a requirement that two Board members must

request every item on the agenda. The discussion at the Board meeting suggested there are many items which surface that any one member could request to be placed on the agenda. There are times when the issue needs support from more than one member.

During the November, 1986 meeting, the policy was submitted for second reading as revised. (See exhibit #2.) The major difference is the language which changed from requiring two Board members to endorse every item requested to any Board member being able to request an item on the agenda. But, depending on the nature of some items, the Board President may require the support of two members before placing that item on the agenda. That policy was ultimately approved and it is that policy in question by the Justice Department.

In an attempt to describe the Board's intent to the best of my ability, I believe it is safe to say that policy was intended for all Board members, not any one specific member. It places the same requirement on every Board member, not singling out any one member for the requirement. The purpose for the policy was to add structure to the School Board meetings. Meetings were very lengthy. Oftentimes discussion on items that didn't have any support whatsoever, caused lengthy meetings. The Board's intent was to have agenda items for Board meetings restricted to those pertaining to the business involved with the operation and governance of the school system. The rationale behind having two members to request an item on the agenda was that if two people did not support an issue, that issue had absolutely no chance of being considered and an equally unlikely chance of being passed.

Another aspect (See exhibit #3) states that there will be two times on the agenda for public participation. Any member of the general public may speak on agenda items prior to the Board action. This was a new addition. It allows the general public to address agenda items. Also, BED(Local) provides another opportunity at the end of the meeting for the general public to bring to the Board's attention any issue deemed necessary. This discussion *is not* limited to items which are on the agenda. Under this policy this Board will listen to the public concern and direct the Administration to do one of two things. (1) Take action to resolve the problem without the necessity of Board action. (2) Place that item on the agenda for the next Board meeting in the event it requires Board action. The policy does not restrict public input. It does, in fact, give the public more opportunity for input than previous policies.

The combination of these policies have created a more structured atmosphere for the business meeting of the District. Therefore, it appears to be successful. Since implementation, the business meetings have been less lengthy than in the past. Furthermore, at the present time, there has not been a request for an agenda item from anyone which has not been placed on the agenda in one form or another.

No. 87-2118

FILED
SEP 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXANDER M. ROJAS, THERESA GUTIERREZ, RUBEN CARAVEO, TERRI PEREZ AND WENCESLAO GUTIERREZ, JR.,

Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT; VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JAY LACK, DALE PIGOTT, JAMES MURPHY, JOHN WILSON, STEVE BENNETT, JOE CONTI, JR., Trustees; LARRY R. VAUGHN, Superintendent, Victoria Independent School District; and VAL HUVAR, County Clerk, County of Victoria,

Appellees.

On Appeal From the United States District Court of the Southern District of Texas

---

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Reply Brief	1
Statement of the Case	1
Summary of Argument	7
Conclusion	10
Appendix: BED(LOCAL)	1a

TABLE OF AUTHORITIES

Cases	Pages
Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed 2d 1 (1969).....	8, 9
United States v. Victoria Independent School District, No. V-86-17 (S.D. Tex. November 14, 1986)	5
Federal Statutes	
42 U.S.C. §1973c	9

IN THE

SUPREME COURT OF THE UNITED STATES

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v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees

On Appeal From the United States District Court For The Southern District Of Texas

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APPELLANTS' REPLY BRIEF

Pursuant to Supreme Court Rule 16, Appellants file this Reply Brief responding to Appellees' Motion to Dismiss or Affirm.

STATEMENT OF THE CASE

Appellees represent that policy BE(LOCAL) is a housekeeping measure, passed because of several

very lengthy meetings involving items that had been on the agenda more than once and voted down. Appellees' reasons become less than neutral in the context of the facts preceeding adoption of policy BE(LOCAL).

The record below shows that during the year preceding the adoption of BE(LOCAL) the only items reflected in the Board minutes as repeatedly before the Board for action during open meetings were those of the $6.8 million bond issue and the school district's plan for remedying the racial imbalance of schools which included the closing of three of five minority neighborhood elementary schools. These items together were on the Board's agenda twelve times and the subject of several public hearings from October 1985 through May 1986. Policy BE(LOCAL) was initially proposed in April of 1986.

The two issues were linked in that the plan to remedy racial imbalance included construction of additions at several schools to accommodate students

from the closed elementary schools. The construction was to be funded by the $6.8 million received from issuance of bonds by the district.

The Mexican American community vocally and actively opposed the closing of minority neighborhood schools and the election to approve the issuance of bonds at board meetings and in public hearings. Theresa Gutierrez, the only Mexican American school board member, openly worked with the minority community in their opposition efforts.

Mrs. Gutierrez voted against approving the canvass of votes for the bond election because the district had failed to submit the election to the Department of Justice for preclearance.[1] On October 28, 1985, the day following the canvassing of election, the school district mailed a submission to the Department of Justice pursuant to advice of

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[1]The election for approval of bonds by voters was called by the Board on October 7, held October 26, and canvassed October 27, 1985.

the bond attorneys. The minority community and Theresa Gutierrez actively opposed preclearance of the bond election before the Department of Justice. The election was not precleared until March of 1986. Therefore, award of the contract to issue bonds could not be approved until April 22, 1986, some six months after the election.

On May 15, 1986, Mr. Gutierrez voted against the closing of William Offer Elementary, the school her children attended and the only minority neighborhood elementary school ultimately closed by the Board in its plan to remedy racial imbalances in schools.

On March 28, 1986, Mr. Gutierrez was the sole board vote against the motion not to respond to the options in a letter from the Department of Justice informing the district that it should either submit the numbered position feature for election of at-large trustees for preclearance review or not use that feature in future elections. The Board proceeded with April 1986 elections for at-large

trustees under the system incorporating the numbered position feature. The action taken by the board led to Section 5 of the Voting Rights Act litigation filed by the United States against the district. Mexican American voters attempted intervention and were granted amicus status in the lawsuit. The lawsuit resulted in an adverse decision for the district, rendered just six days before the adoption of policy BE(LOCAL), which required a special election for at-large trustees. See, United States v. Victoria Independent School District, No. V-86-17 (S.D. Tex. November 14, 1986).

On October 16, 1986, the date of first reading for policy BE(LOCAL), an article entitled "Board President Reflects on Animosity" was carried in the local newspaper. Board President Johnny Wilson stated that since the election 18 months before, the level of frustration among board members over

issues had mounted.[2]

In a newspaper account of the board meeting November 11, 1986, Board President Johnny Wilson stated that the Board often heard from the same individuals on repetitive topics. He further stated that he wished to hear from more of the public than the same three individuals who had addressed the Board earlier in the evening. Further in the article those persons were identified as Dwight Harris, representative of American Federation of Teachers, Wenceslao Gutierrez, Stroman school parent and husband of a trustee, and Alexander Rojas, representative of LULAC Council 626. Wilson finally commented that people who speak at citizen hearings are not representatives of the city, but persons who simply call and talk to trustees are. Of the six persons identified as addressing

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[2]The referenced election was the first held under the system incorporating single-member districts in which Theresa Gutierrez was elected.

the board on November 11, 1986, five were Mexican American, and one was black.

During the eighteen months of single-member district representation on the school board prior to the adoption of BE(LOCAL), the school district had become embroiled in issues of particular importance to the Mexican American community, and the Mexican American community had become vocal and active with the full support of Theresa Gutierrez.

SUMMARY OF ARGUMENT

In response to the eighteen months of minority activism in the school district, the Board enacted BE(LOCAL). Policy BE(LOCAL) was clearly directed to limiting the Mexican American community's ability through their representative to address concerns and bring issues of importance to them before Board open meetings. Although policy BE(LOCAL) would be effective only in circumstances outside of the actual election process, the

policy has the potential to severely impact the effectiveness of the votes cast by the Mexican American voters of the single-member district who put Theresa Gutierrez in office. See, Allen State Board of Elections, 393 U.S. 544, 565, 89 S.Ct. 817, 831-832, 22 L.Ed. 2d 1, 17(1969).

The district has argued that its policy BED(LOCAL) adequately provides for citizen input at Board meetings, ameliorating the effect of BE(LOCAL). However, Policy BED(LOCAL) restricts citizen input at meetings to items on the agenda only during a time block at the beginning of each meeting. A second block of time is provided for addressing issues of citizen interest after adjournment of the meeting. The policy provides for very limited Board responses to expressed interests. Appendix, p. 3a. There is no provision for the placement of an issue addressed by citizens on the agenda of a Board meeting. Clearly, BED(LOCAL) does nothing to ameliorate the effects of BE(LOCAL).

Allen interprets Section 5 to include in the right to vote "all action necessary to make a vote effective." Allen, supra, 393 U.S. at 565, 89 S.Ct. at 831-832, 22 L.Ed. 2d at 17. The purpose of potential for representation for Mexican American voters theoretically provided by the single-member district election system is voided when, after election, action by the Board causes their chosen representative to be unable or threatened with the inability to bring before board public meetings issues which are important to minority voters, but may be unimportant or threatening to other voters. In Victoria school district, the right to vote of Mexican Americans in the single-member district electing Theresa Gutierrez is in imminent danger of violation because BE(LOCAL) can render their votes cast for representation ineffective. Therefore, policy BE(LOCAL) is subject to §5 preclearance requirements.

CONCLUSION

Appellees' motion should be denied, probable

jurisdiction in this case should be noted and the cause set for oral argument.

Respectfully submitted,

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APPENDIX

BOARD MEETINGS:
PUBLIC PARTICIPATION

EXHAUSTION OF ADMINISTRATIVE REMEDIES	Complaints and concerns for which other resolution channels are provided shall be directed through those channels. (See DGBA, DNC, DO series, DQE, EFA, EHBA, FMA, FNG, FOA, FOD, and GF) If the Board President determines that a person has not attempted to resolve a matter administratively, the person shall be directed to the appropriate policy for attempted resolution before bringing the matter to the Board.
OPEN FORUM	At regular meetings the Board shall allow two blocks of time to hear persons who desire to make comments to the Board. The first of these time blocks shall be at the beginning of each meeting for the discussion of items which are on the agenda. Persons who wish to participate in this portion of the meeting shall sign up as they arrive, indicating the topic about which they wish to speak.

The second time block shall be after adjournment of the regular business meeting and shall be for issues of citizen interest not on the agenda.

During these time periods complaints against an employee shall not be heard unless the issue has been properly placed on the agenda and the individual employee being complained about has had the opportunity to determine whether the hearing is to be open or in executive session.

LIMIT ON PARTICIPATION

Public participation is limited to the designated open forum portion of a meeting. At all other times during Board meetings, the audience shall not enter into discussion or debate on matters being considered by the Board. Presentation shall be restricted to three minutes unless waived by a majority of the Board members. Delegations of more than five persons shall appoint one person to present their views before the Board and tha individual's time limit shall be extended to five minutes.

ISSUED DATE: 10/30/86
UPDATE 28
BED(L)-A

BOARD'S RESPONSE — Specific factual information or recitation of existing policy may be furnished in response to inquiries, but the Board and Administration may not deliberate, discuss, or make any decision on any subject not on the agenda.

ADOPTED: April 23, 1987

ISSUED DATE: 10/30/86
UPDATE 28
BED(L)-A

(4)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

No. 87-2118

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALEXANDER M. ROJAS, ET AL., APPELLANTS

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a school board policy granting the president of the school board the discretionary power to require the approval of two board members to place an item on the agenda for board meetings, where the previous policy enabled each board member himself to place an item on the agenda, is a "standard, practice, or procedure with respect to voting" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Allen v. *State Bd. of Elections*, 393 U.S. 544 (1969) 8
Beer v. *United States* 425 U.S. 130 (1976) 7
Georgia v. *United States*, 411 U.S. 526 (1973) 8
Hardy v. *Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) . 10, 12, 13
Horry County v. *United States*, 449 F. Supp. 990 (D.D.C. 1978) 10, 12, 13
Lockhart v. *United States*, 460 U.S. 125 (1983) 9-10
McCain v. *Lybrand*, 465 U.S. 236 (1984) 10
Rojas v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.) 1, 2, 3, 5, 6
United States v. *Victoria Independent School District*, No. V-86-17 (S.D. Tex. Nov. 14, 1986) 5
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 13

Constitution, statutes, regulations, and rule:

U.S. Const. Amend XIV 13
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 5, 42 U.S.C. 1973c ..... *passim*
§ 14(c)(1), 42 U.S.C. 1973*l*(c)(1) 8
42 U.S.C. 1983 13
Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, § 3(A)(a) (Vernon Supp. 1988) 2
Tex. Education Code Ann. (Vernon):
§ 17.08(d) (1972) 2
§ 23.19(d)(1) (1987) 4

Regulations and rule – Continued: Page

28 C.F.R. Pt. 51 6
Section 51.13 ..... 6, 10
Fed. R. Civ. P. 12(b)(6) 6

Miscellaneous:

40 Fed. Reg. 43,746 (1975) 1
52 Fed. Reg. 488 (1987) 10
H. Robert, *Robert's Rules of Order, Newly Revised* (1981) 2, 11
H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) 7

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Victoria Independent School District (School District), located in Victoria, Texas, is governed by the seven-member Board of Trustees (School Board). Since 1984, voters have elected five board members from single-member districts and two members from the entire School District at-large (Original Complaint 6, *Rojas* v. *Victoria Independent School District,* No. V-87-16 (S.D. Tex.)).[1]

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[1] The Voting Rights Act of 1965 was extended to the State of Texas in 1975, covering changes in election procedures from those in effect on November 1, 1972. See 40 Fed. Reg. 43,746 (1975). Section 5 of the Act, 42 U.S.C. 1973c, bars covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, prac-

In April 1985, appellant Theresa Gutierrez was elected from a single-member district with a 51.4% Hispanic population and a 14% black population. She became the first and only Mexican-American ever elected to the School Board. J.S. App. 2a-3a; Stip. of Facts 2, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.).

2. The School Board may transact business that is "binding on the [School] District only when it is in session with a quorum present and minutes are kept" (Stip. of Facts, *supra*, Exh. 10). A majority of the members of the School Board constitutes a quorum (Stip. of Facts, *supra*, Exh. 5, at 2, Exh. 6, at 3); the School Board's actions are taken by majority vote (Tex. Educ. Code Ann. § 17.08(d) (Vernon 1972)).[2] The School Board conducts its meetings according to the parliamentary procedures contained in H. Robert, *Robert's Rules of Order, Newly Revised* (1981) (Stip. of Facts, *supra*, Exh. 8, at 2). In order to present a matter for debate, a board member, having the floor, must make a formal motion and obtain a second from the floor. See *Robert's Rules of Order, supra*, at 326-327.

Under state law, the School Board must publish an agenda before convening any official meeting. See Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, § 3(A)(a) (Vernon Supp. 1988) (*reprinted at* J.S. App. 13a). Although board members may discuss non-agenda matters, they may not take any action on such

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tice, or procedure with respect to voting" different from that in force or effect on the date the jurisdiction became covered under the Voting Rights Act, without first obtaining preclearance from the United States District Court for the District of Columbia or the Attorney General of the United States.

[2] "Board members have no authority except when functioning as a member of the [School] Board in an official meeting" (Stip. of Facts, *supra*, Exh. 9).

matters beyond placing them on an agenda for a future meeting (*ibid.*). According to School District policy, any other action taken on a matter not on the agenda is voidable. Stip. of Facts, *supra*, Exh. 5, at 2, Exh. 6, at 2.[3]

3. Since at least 1979, the School District has had a policy governing the preparation of agendas for School Board meetings.[4] In that year, the School District adopted an agenda policy that the "Superintendent must be notified of all agenda items" and that the agenda would be closed eight days before a regular meeting (Stip. of Facts, *supra*, Exh. 3). That general policy did not clarify whether board members alone could place items on the agenda or whether members of the general public also had this privilege. In 1983, the School District changed its policy to make clear that only board members could place items on the agenda, that such requests must be in writing, and that they must be submitted at least four days before a board meeting (Stip. of Facts, *supra*, Exh. 4).

In October 1986, a new agenda policy was proposed to the School Board. That policy would require the request of two board members in order to place an item on the agenda (Stip. of Facts, *supra*, Exh. 7, at 1). On November 20, 1986, the School Board adopted a modified version of the proposed policy. The new policy provides that

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[3] School Board policy also provides for two periods of public comment at the Board's regular meetings, one at the beginning for the discussion of items on the agenda, and another after "adjournment of the regular business meeting * * * for issues of citizen interest not on the agenda" (Addendum to Joint Stip. of Facts Exh. 15, at 1, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.)).

[4] The record does not show the School District's policy or practice on November 1, 1972, the Section 5 coverage date for Texas. See note 1, *supra*. Apparently, the parties litigated this action on the assumption that the challenged agenda policy differed from that in effect on November 1, 1972.

"[r]equests for agenda items may be made by any Board member," and that "[d]epending on the nature of the items submitted, the President may require the approval of two Board members to secure placement of that item on the agenda" (Stip. of Facts, *supra*, Exh. 8, at 1).[5]

On February 27, 1987, the United States Department of Justice, by letter, requested the School District to submit to the Department, under Section 5 of the Voting Rights Act, its policy change requiring the request of two board members to place an item on the agenda. The Department stated that "this change in policy would seem to have a significant impact on the nature and character of the representation that voters can expect from their individually elected representative[s] under the newly effective single-member district plan" (J.S. App. 14a). On March 10, 1987, the School District responded to the Department's request. The School District explained that the Department had received erroneous information concerning the policy actually adopted, and attached a copy of the policy adopted on November 20, 1986, which gave the board president the discretion to require the approval of two board members to place an item on the agenda (Stip. of Facts, *supra*, Exh. 14). There was no further correspondence between the Department and the School District over the matter.[6]

[5] The president of the School Board is a board member selected by the members at the first meeting after each election. See Tex. Educ. Code Ann. § 23.19(d)(1) (Vernon 1987).

[6] The Department's letter is not an official determination that Section 5 of the Voting Rights Act applies to the matter at issue. It is the Department's practice, when informed of a matter that might require Section 5 review, to request a submission of additional information that would clarify the question of coverage under the Voting Rights Act.

In this case, the Department sent the School Board the February 27, 1987, letter largely out of concern over the timing of the November 20,

4. On March 23, 1987, appellants, Mexican-American residents and registered voters of the School District, including School Board member Theresa Gutierrez, filed this action against the School District and the School Board in the United States District Court for the Southern District of Texas.[7] The complaint alleged, among other claims,[8] that the adoption of the November 20, 1986, agenda preparation policy was a voting change requiring preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that appellees' implementation of that new policy without preclearance violated the Act. Appellants contended that adoption of the new agenda policy was a change "with respect to voting" under Section 5 because that policy diminished the power of board members other than the president and therefore reduced the effectiveness of the representation available to constituents of the remaining board members elected from single-member districts. See Appellants' D. C. Br. 15-19.

1986, agenda policy change. Just six days earlier, on November 14, 1986, the Department had prevailed in a Section 5 enforcement action against the School District. That action challenged a numbered post requirement that the District had implemented in 1985 for the two at-large positions on the School Board. See *United States* v. *Victoria Independent School District*, No. V-86-17 (S.D. Tex. Nov. 14, 1986). Appellees have sought no further review of that decision.

[7] Other named defendants included the School District Superintendent, the Victoria County Clerk, and the individual members of the School Board.

[8] The complaint also alleged that the School District's use of certain language in the ballot instructions for a special election for the at-large seats on the School Board "effectuates an anti-single shot voting requirement" that had not been precleared. Original Complaint 8, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (S.D. Tex.). The district court severed this portion of the lawsuit and joined it with the earlier action filed by the United States against the School District. See note 6, *supra*.

More specifically, appellants argued that the agenda policy change had diluted the representation available to the Mexican-American voters of the only district that had elected a Mexican-American to the School Board. See Original Complaint, *supra,* at 10; Appellants' D. C. Br. 16.[9]

5. The three-judge district court unanimously held that the challenged agenda policy was not a "change affecting voting" under Section 5 of the Voting Rights Act (J.S. App. 8a-9a). It observed that the policy "clearly lies beyond the actual election process itself and beyond those actions listed [in the Department of Justice regulation, 28 C.F.R. 51.13]" (J.S. App. 3a).[10] The court found that "the only powers exercised by the [School Board] are exercised as a body" (*id.* at 4a). Recognizing that rules of parliamen-

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[9] Appellants also contended that the agenda policy change has "the potential for discrimination" because the School Board President could require two votes whenever appellant Gutierrez, the only Mexican-American board member, sought to place an item on the agenda that had special significance to the Mexican-American community. Appellants' D. C. Br. 30; see *id.* at 19-31. Finally, appellants emphasized that during the time period surrounding the adoption of the new agenda policy, Gutierrez and the Mexican-American community in the School District repeatedly opposed the policies and proposals advocated by the majority of the School Board members. See, *e.g.*, Appellants' D. C. Reply Br. 2-8. Appellants thus suggested that the School Board changed its agenda policy in order to restrict Gutierrez's ability to represent her constituents.

Appellants also filed a motion to convene a three-judge court under 42 U.S.C. 1973c. On June 2, 1987, the district court denied appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6), and granted appellants' motion to convene a three-judge court. Order, *Rojas* v. *Victoria Independent School District*, No. V-87-16 (June 2, 1987).

[10] Part 51 of Title 28 of the Code of Federal Regulations, chapter 1, sets forth the procedures governing the administration of Section 5 of the Voting Rights Act of 1965. Section 51.13 is a non-exclusive list of examples of changes affecting voting.

tary procedure require "a second to bring any matter before [the] body for discussion," the court reasoned that the policy does no more than "advance the time at which a second becomes requisite to drawing a matter before the board" (*id.* at 5a). The court therefore concluded that the effect of the policy on the actual power of elected board members was "at most min[u]scule" (*id.* at 4a). Finally, the court determined that the policy does not single out appellant Gutierrez for unfavorable treatment, and that the School Board has never applied the policy to her disadvantage (*id.* at 6a).[11]

DISCUSSION

The decision of the district court, holding that the November 20, 1986, agenda preparation policy is not a change affecting voting under Section 5 of the Voting Rights Act, is correct. The decision does not involve a substantial question under the Voting Rights Act and does not conflict with any decision of this Court or any other federal court. Plenary review is therefore unwarranted and the decision should be summarily affirmed.

1. Congress enacted Section 5 of the Voting Rights Act as " 'a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.' " *Beer* v. *United States,* 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57 (1975)). Under Section 5, jurisdictions subject to the Act must therefore obtain "preclearance" from either the United States District

[11] As the court stated, "[i]t seems plain to us that if Mrs. Gutierrez is unable to persuade even one other trustee to join her in placing a matter on the board's agenda, she would have had no better success in procuring a second should she have moved it at a meeting—let alone in collecting the four votes required to pass it" (J.S. App. 5a-6a).

Court for the District of Columbia or the Attorney General of the United States, for "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect on the date the jurisdiction became covered under the Act. 42 U.S.C. 1973c; see note 1, *supra*.

Congress intended Section 5 to be applied broadly. The Act itself defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election." 42 U.S.C. 1973*l*(c)(1). Moreover, the scope of Section 5 is not limited to changes directly affecting the casting of a ballot. The Court has recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 569 (1969) (change from district to at-large voting for county supervisors covered by Section 5); see *Georgia* v. *United States*, 411 U.S. 526, 534 (1973) (reapportionment covered by Section 5). Thus, Section 5 covers changes that affect "the power of a citizen's vote" (*Allen*, 393 U.S. at 569), as well as those that "undermine the effectiveness of voters" (*id.* at 570).

2. The Voting Rights Act protects voters, not elected officials. Nonetheless, there are circumstances in which a change in the powers of elected officials may reduce (or eliminate) the ability of minority voters to elect those officials with decisionmaking authority. Consider, for example, a seven-member legislative body that has four members elected from single-member districts and three members elected at-large, which then decides to delegate to a committee comprised of the three members elected at-large the power to decide all fiscal matters, a power that a majority of the body previously exercised. In such a case, the change—limiting the power of the members elected from single-member districts over fiscal matters—would

affect the ability of the constituents in those districts to elect members who decide fiscal matters. That change would certainly limit the power and effectiveness of voters in the single-member districts and thus would be covered by Section 5.

Indeed, this Court recognized in *Lockhart* v. *United States,* 460 U.S. 125 (1983), that a reallocation of elected officials' power can be a change within the scope of Section 5. In *Lockhart*, the city had changed its governmental structure from a mayor and two commissioners to a mayor and four council members. Although the city conceded that the addition of two seats was a change subject to Section 5, it argued that Section 5 did not apply to the "continuation" of the two old seats (460 U.S. at 131). The Court rejected this argument, stating that, "[i]n moving from a three-member commission to a five-member council, [the city] has changed the nature of the seats at issue" (*ibid.*). The Court noted that, as a result of the new governmental structure, the two "old" seats "constitute only 40% of the council, rather than 67% of the commission" (*ibid.*). Thus, the transfer of power from a three-member body to a five-member body had the potential for undermining the effectiveness of constituents' votes (*id.* at 131-132).[12]

[12] In exercising its administrative responsibilities under Section 5, the Department of Justice has under certain circumstances treated changes in elected officials' power as covered: (1) Mobile, Alabama (March 2, 1976), involving assignment of specific administrative functions to each commissioner; (2) LaPorte, Texas (December 27, 1979), involving an increase in the number of council positions from five to seven and changing the role of the council members from legislative/administrative to purely legislative; (3) City of Brunswick and Glynn County, Georgia (August 16, 1982), involving a consolidation of the city and county governments and the respective boards of commissioners; and (4) Waycross, Georgia (February 6, 1988), involving changes in the power and duties of the mayor. See also Brief for the United States 15-16, *Lockhart* v. *United States*, 460 U.S. 125

3. Against this background, we disagree with the district court's suggestion that Section 5 can never reach an "[o]rdinary, routine legislative modification of the duties or authority of elected officials" (J.S. App. 3a). Depending on the court's definition of "ordinary" and "routine," such changes may in fact negate the effectiveness of the vote, and may therefore fall within the scope of Section 5. At the same time, however, not every change in the powers of elected officials is a change affecting voting. Here, the district court correctly held that Section 5 did not cover the change at issue because the November 20, 1986, agenda preparation policy does not shift any decisionmaking power, and thus cannot affect a voter's ability to elect board members who exercise such power.

The November 20, 1986, agenda preparation policy gives the School Board President the power to require, at

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(1983) (No. 81-802) (contending that the city's adoption of a home rule charter and the resulting restructuring of the city's government was "a redistribution of powers among officials elected by different constituencies" and thus covered by Section 5); Brief for the United States as Amicus Curiae Urging Reversal 21-27, *McCain* v. *Lybrand,* 465 U.S. 236 (1984) (No. 82-282) (arguing that the transfer of power to county government officials by the implementation of home rule was subject to Section 5).

Moreover, the Department has considered adding to the list of voting changes contained in 28 C.F.R. 51.13 an example that would reflect the decisions in *McCain* v. *Lybrand, supra, Hardy* v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), discussed *infra,* and *Horry County* v. *United States,* 449 F. Supp. 990 (D.D.C. 1978) (three-judge court), discussed *infra,* concerning the reallocation of governmental power. The Department declined to do so, stating, "[w]hile we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 488 (1987).

his discretion, the request of two board members to place an item on the agenda. That policy, of course, does not affect any powers of the School Board as a whole. The policy also does not affect the power of an individual board member to influence the outcome of School Board decisions, since those decisions continue to require a majority vote. Nor does the policy change the fact that school board members do not have any decisionmaking power in their individual capacities.

Indeed, the agenda preparation policy does not even affect a board member's ability to have matters of interest to his constituents discussed at board meetings. Although the policy may, when implemented, prohibit a member from placing a particular item on the agenda (when that member cannot obtain a second request for the agenda item), merely placing an item on the agenda is not a sufficient condition for full discussion or board action, and thus does not ensure that either will occur. Under applicable parliamentary procedure, the sponsoring member must obtain a second either to initiate discussion or to propose a resolution for a vote.[13] Thus, as the district court concluded, "at most, the effect of the challenged change is to advance the time at which a second becomes requisite to drawing a matter before the board" (J.S. App. 5a).

Furthermore, board members may address, in a limited fashion, matters not on the agenda, and may take steps to place such matters on the agenda for the next meeting. Thus, an individual member can create a public record of the School Board's refusal to place an item on the agenda by requesting at a meeting that the item be placed on the agenda for the next meeting. See also Appellees' Mot. to Dis. or Aff. App. 7a-9a. In sum, the agenda preparation policy's restriction on an individual board member's

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[13] See *Robert's Rules of Order* 26-34.

power, which does not undermine the effectiveness of his constituents' votes, does not fall within the scope of Section 5.

4. Contrary to appellants' suggestion (J.S. 16), the district court's decision does not conflict with *Hardy* v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court), and *Horry County* v. *United States,* 449 F. Supp. 990 (D.D.C. 1978) (three-judge court). In *Hardy*, the court concluded that a state statute providing for the governor to appoint members of a county racing commission, where formerly the county's state legislative delegation appointed those members, was a change within the meaning of Section 5 because of "its effect on the power of the voters." 603 F. Supp. at 178. The court stated that "the transfer of appointment authority to the governor, over 99.7% of whose constituents are not inhabitants of Greene County, substantially dilutes the power of the voters in Greene County by effectively eliminating the power of such voters over the Commission." *Id.* at 179. In other words, the transfer of power in *Hardy* did affect the ability of the voters in Greene County to elect persons with decisionmaking authority.

Similarly, in *Horry County* the court held that a state statute providing for the direct election of a county board of commissioners, where the governor previously appointed commissioners upon the recommendation of the county legislative delegation, and giving that board additional legislative authority, was also a change subject to Section 5. The court stated that the statute could dilute voting rights, and would "reallocate[] governmental powers among elected officials voted upon by different constituencies." 449 F. Supp. at 995. If minority voters had more influence on the choice of governor or the legislative delegation, the change to direct elections could

diminish the effectiveness of those votes; as a result, minority voters would have less influence in the selection of the county commissioners. See *id.* at 995-996.

Thus, both *Hardy* and *Horry County* involved changes in the allocation of power among elected officials which, in turn, affected certain voters' ability to elect officials with decisionmaking power. In this case, however, the November 20, 1986, agenda preparation policy has no effect on the power of individual board members or the School Board itself to transact official business. The policy, therefore, does not undermine the effectiveness of any individual's vote and consequently falls outside the scope of Section 5 of the Voting Rights Act.[14]

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[14] There is no merit to appellants' contention (J.S. 20-21) that the district court improperly based its decision on a determination that the new policy was in fact not discriminatory. To be sure, the court noted that appellants might be able to mount a constitutional challenge if the policy were applied in a discriminatory manner (J.S. App. 6a & n.5 (citing *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)). That observation, however, simply cannot be construed as a ruling that the change affects voting but falls outside the scope of Section 5 because it is not discriminatory. Indeed, as the district court emphasized, appellants conceded "that in fact [the policy] has yet to be applied to *any* measure" (J.S. App. 6a n.5 (emphasis in original)).

We recognize that an allegation that appellees purposefully adopted the new agenda policy in order to limit the ability of the only Mexican-American board member to raise matters at School Board meetings could give rise to a cause of action on behalf of that board member under the Fourteenth Amendment and 42 U.S.C. 1983. But as explained above, such an action would not constitute a change affecting voting under Section 5 of the Voting Rights Act.

CONCLUSION

The judgment of the district court should be affirmed.
Respectfully submitted.

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No. 87-2118 (5)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ALEXANDER M. ROJAS, THERESA GUTIERREZ
RUBEN CARAVEO, TERRI PEREZ AND
WENCESLAO GUTIERREZ, JR.,

Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT;
VICTORIA INDEPENDENT SCHOOL DISTRICT BOARD
OF TRUSTEES; JAY LACK, DALE PIGOTT,
JAMES MURPHY, JOHN WILSON, STEVE BENNETT,
JOE CONTI, JR., Trustees; LARRY R. VAUGHN,
Superintendent, Victoria Independent
School District; and VAL HUVAR,
County Clerk, County of Victoria,

Appellees.

On Appeal From the United States District Court of the Southern District of Texas

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APPELLANTS' SUPPLEMENTAL BRIEF

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30 pp

TABLE OF CONTENTS

Page

Statement 1

Discussion 8

Conclusion 20

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 19

Dougherty County Bd. of Education v. White, 439 U.S. 32 (1978) 18

Constitution, statutes, regulations, and rules:

U. S. Const. Amend XIV 19

Voting Rights Act of 1965, 42 U.S.C. 1973 et seq.:

Sec.2, 42 U.S.C. 1973 10

Sec.5, 42 U.S.C. 1973c . . . . . passim

Texas Open Meetings Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17, Secs. 3A(a) (Vernon Supp.1988) . . 11,15

Miscellaneous

H. Robert, Robert's Rules of Order, New Revised (1981). 10,12 13,15

U.S. Comm'n. Civil Rights, The Voting Rights Act: Ten Years After (1975) 10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 87-2118

ALEXANDER M. ROJAS, ET AL., Appellants,

v.

VICTORIA INDEPENDENT SCHOOL DISTRICT, ET AL.,

On Appeal From the United States District Court for The Southern District of Texas

---

APPELLANTS' SUPPLEMENTAL BRIEF

This Supplemental Brief of Appellants responds to the Brief for the United States as Amicus Curiae.

STATEMENT

1. In the first election held under the new system, Theresa Gutierrez was elected as the first and only Mexican American female to serve on the Victoria I.S.D. Board, representing a majority Mexican American single-member district. (Stip. of Facts 2, Rojas v. Victoria I.S.D.,

No. V-87-16 (S.D. Tex.)).[1/]

2. Beginning five months after Gutierrez's election and culminating upon of the Department of Justice's February 27, 1986, correspondence to Victoria I.S.D., a sequence of events occurred in the school district which created a confrontation between the minority community and the school Board over issues where Gutierrez, as a member of the Board, asserted her lone voice on behalf of her constituents, the

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[1] The Victoria Independent School District Board of Trustees system of election was changed by resolution of the Board on November 15, 1984, from at-large, by numbered place for the seven Board members, to one providing for election of five from single-member districts and two from the school district at-large by plurality vote. (Original Complaint 6, Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex.)). On February 14, 1950 the school district received preclearance allowing implementation of the new election system in April 1985 elections. (Id.) Subsequent references to the record in this case will omit the case name and number after the initial citation to the pleading. Victoria Independent School District will be referred to as Victoria I.S.D.

voice on behalf of her constituents, the minority community.[2]

3. On March 21, 1986, the United

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[2] In October of 1985, the Department of Education issued Victoria I.S.D. an ultimatum concerning the need for correction of the racial imbalance of five elementary schools in the district. (Tr. R. Pls.' Ex. 4, p. 4, Rojas v. Victoria I.S.D., No. V-87-16 (S.D. Tex.)). In response to that ultimatum, the school district announced the closing of at least three of the racially imbalanced neighborhood elementary schools and called for a bond election to fund the construction of facilities to accommodate population changes at other schools. (Tr. R. Pls.' Ex. 4, p. 4-5). The bond election was not submitted for preclearance until after the election was held. (Id.).

During the subsequent seven months, minority community members organized and protested against the closing of neighborhood schools at school Board meetings and the preclearance of the bond election before the Department of Justice. (Tr. R., Pls.' Ex. 4, p. 5-7). Theresa Gutierrez was intimately involved in the minority community's activity. (Id.) Because of the controversy over the bond election, preclearance of the election was delayed until March 1986 which resulted in the delay of the issuance of the bonds and receipt of money for construction until after April 1986. (Id.) On May 15, 1986, the Board finally voted, 6-1, to close only one of the minority neighborhood schools, William Offer Elementary, the school Theresa Gutierrez's children attended. (Id.)

States Attorney General, by correspondence, notified Victoria I.S.D. that the district's 1985 resolution adopting numbered posts for election of its two at-large school Board trustee seats was subject to Sec. 5 requirements before implementation. (Stip. of Fact, Ex. 10, United States v. Victoria I.S.D., No. V-86-17 (S.D. Tex.)). Subsequent to the school district's refusal to submit the change, on April 4, 1986, the United States filed a Sec. 5 enforcement action against Victoria I.S.D. (Orig. Complaint, United States v. Victoria I.S.D., No. V-86-17 (S.D. Tex.)).[3/]

4. On October 16, 1986, Board

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[3] A group of Mexican American voters including associates of Theresa Gutierrez were allowed participation as amici in the litigation. (Order, United States v. Victoria I.S.D., No. V-86-17 (July 2, 1986)). On November 14, 1986, the United States prevailed in the lawsuit against the school district. See, United States v. Victoria I.S.D., No. V-86-17 (S.D. Tex. Nov. 14, 1986).

President Wilson circulated a memo which recommended changes in policy BE (LOCAL) to other Board members. (Tr. R. Ex. 1, Vaughn Dep. Ex. 11).[4] On October 21, 1986, the day of the first reading of Policy BE (LOCAL) in a Board meeting, Wilson circulated correspondence to the Board specifically addressing the controversy on the Board as a problem. (Tr. R. Ex. 2, Wilson Dep. Ex. 3).[5]

5. On November 20, 1986, six days after the decision against Victoria I.S.D. in the litigation, the Board passed Policy

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[4] On the same day, an interview appeared in the local Victoria newspaper with Wilson in which he stated that animosity and the level of frustration within the Board had increased over the eighteen months since the election of the Board under the new system. (Tr. R. Ex. 2, Wilson Dep. Ex. 1.)

[5] The major source of the growing controversy and animosity in the school district and among Board members had been the proposed closing of minority schools. (Tr. R. Ex. 2, Wilson Dep. p. 33-34).

BE (LOCAL) with Gutierrez casting the sole dissenting vote. The adopted policy had been discussed at length in a prior Board meeting, November 12, 1986, in the context of a citizens' hearing. (Tr. R. Ex. 2, Wilson Dep. Ex. 3, Rojas v. Victoria I.S.D., No. V-87-16). In that meeting, Board President Johnny Wilson stated that citizens speaking before the Board were not representatives of the people in the city and that the Board would like to hear from other citizens, not the three who had addressed the Board that evening. (Id.) [6]/

6. The Superintendent of Victoria I.S.D. subsequently sent two memos to Gutierrez, dated February 24 and 27, 1987, concerning Gutierrez's objection to and sole negative vote on the Transfer Policy and the

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[6] The three persons were identified as minority members of the community and close associates of Theresa Gutierrez. (Id., Tr. R., Ex. 4, p. 7).

Public Information Policy presented at prior board meetings. (Tr. R. Ex. 1, Vaughn, Dep., Ex. 6 and 7). The Superintendent, contrary to standard practice, asked Gutierrez to contact him or submit written objections to him concerning agenda items prior to the meetings. (Id.) Previously, the Superintendent had never asked any other Board member to submit disagreements with agenda items to him prior to Board meetings. (Tr. R. Ex. 1, pp. 64-65). As expressed, he felt it necessary to treat Ms. Gutierrez differently because the Board was having difficulty communicating with her. (Tr. R. Ex. 1, p. 66).

7. On February 27, 1987, the United States Attorney General notified the school district that its agenda preparation policy was subject to Sec. 5 requirements and should either be submitted for administrative preclearance review or a

declaratory judgment sought from the District Court for the District of Columbia. (J.S. App. 14a-15a).

8. The lawsuit that is the subject of this appeal was filed on March 27, 1987.

DISCUSSION

The United States, in its Amicus brief, explicitly disagrees with the district court's suggestion that Sec. 5 can never reach an "'[o]rdinary, routine legislative modification of the duties or authority of elected officials,'" stating that "such changes may in fact negate the effectiveness of a vote." (A.C. 10). The United States, however, also supported the district court's determination that Sec. 5 did not cover the change in issue because the November 20, 1986, agenda preparation policy "does not shift any decision making power." (Id.)

The logic exercised by the United States is a dismaying effort by the

enforcers of the Voting Rights Act to circumvent the real issues in this litigation. The impact of the agenda preparation policy is on the ability of a minority official, once elected, to adequately represent the interests of her constituents in the governing process. The proper question is not whether the representative will be allowed to vote in the decision-making process, but whether, as a member of the body, she will be allowed to bring to the public forum for discussion and debate, issues of particularized interest to her constituents, despite the level of popularity or unpopularity with the dominant Anglo majority members of the Board. It is a question that goes beyond the access provided voters by the electoral structure to the issue of civic inclusion and the effectiveness allowed representatives of the minority community who are now being elected

to office because of the 1982 amendment of Sec. 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973.

> "The Voting Rights Act was designed to enable minority citizens to gain access to the political process and to gain the influence that participation brings."

U.S. Comm'n. Civil Rights, The Voting Rights Act: Ten Years After, at 8 (1975). Here, the intent and potential effect of the agenda policy is the minimization of the influence recognized above. By changing the rules and powers of officials after election of a minority representative, the exclusion of minority voters from effective political participation within the governing body is continued.

The United States bases its position that the agenda preparation policy had no effect on the power of the individual board members because the board conducts meetings under Robert's Rules of Order, Newly Revised

(1981), prohibiting the Board from discussing items on the agenda unless the item is seconded. (A.C. 11) Therefore, the agenda preparation policy, as the district court concluded, only advances the time at which a second is required to bring a matter before the Board. (Id.) Further, the United States asserts that under the Texas Open Meetings Act, a Board member may seek to have an item placed on the agenda during a board meeting. (Id.) Thus, because there may be the public recordation of the effort and its rejection, the effectiveness of the Board member's vote is not undermined by the agenda policy. (A.C. 11-12). The United States also attempts to diminish the importance of the circumstances surrounding the enactment of policy BE (LOCAL) and the letter from the Department of Justice ("Department") to Victoria I.S.D. (A.C. 4,

n. 6) [7]

In reaching its determination that the November 20, 1986, agenda preparation policy is not a change affecting voting under Sec. 5 of the Voting Rights Act, the District Court relied primarily on a finding that school board meetings are conducted under a standard parliamentary procedure. (J.S. App. 4a-5a). The position of the United States is based on the identical erroneous premise (A.C. 2). Both the decision of the District Court and the position of the United States are contrary to the record in this case.

While the challenged agenda preparation policy provides that "the Board shall observe parliamentary procedures as found in Robert's Rules of Order, Newly Revised," it

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[7] The United States asserts the inquiry was prompted only by the proximity of the change to the culmination of its Section 5 enforcement action. (A.C. 6, n. 9).

nonetheless, also provides "except as otherwise provided in Board procedural rules or by law." (App. p. 4a).[8] Through BE (LOCAL) and BED (LOCAL), the Board effected the exception of the open forum which allows any person to speak on any agenda item. (App. p. 3a; R.B. App. p. 1a-3a). Open forum is scheduled immediately after the Board meeting is called to order and prior to presentation of any item to the Board, whether in the form of a motion or a motion and a second. (App. p. 3a). Furthermore, policy BED (LOCAL) does not prohibit Board members from discussing or debating agenda items during the open forum. (R.B. App. pp. 1a-3a). It only prohibits their discussion or debate of items not on the agenda.

The business in Victoria I.S.D. Board

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[8] The reference to conduct of Board meetings under Robert's Rules of Order was not a part of the policy BE (LOCAL) prior to the challenged policy adopted on November 20, 1986. (Stip. of Facts. Exs. 4 and 8).

meetings, by custom, practice and usage, has been consistently conducted under a structure substantially less formal than standard parliamentary procedure. In meetings, both before and after the passage of BE (LOCAL) in November 1986, agenda items have been discussed prior to the presentation of a motion relating to an agenda item or prior to the second of such a motion. (Tr.R.Pls.' Ex. 4). Amended motions are voted on without any vote on the one or more amendments to the motion. (Id.) Action on items may be determined by consensus without a formal motion ever being presented concerning the action. (Id.) Moreover, the record very clearly establishes that Victoria I.S.D. does not operate under a standard parliamentary procedure. Under the actual operating procedures of Victoria I.S.D. Board meetings, an item on the agenda can be

discussed, deliberated and/or decided by the public or by the Board without the requisite motion and second under Robert's Rules of Order for drawing a matter before the Board.[9]

United States' assertions that somehow the recordation of the exercise of the ability to request an item be placed on the agenda and its subsequent rejection by the

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[9] Victoria I.S.D. does, however, operate under the strictures of the Texas Open Meetings Act ("Act"). (App. p. 1a-12a) (Stip. of Fact 13). The Act's restrictions on the conduct of business by the Board are set forth in policies BED (LOCAL) and BE (LOCAL). (R.B. App. p. 1a-3a; App. p. 1a-6a). Under school district policy, no item can be deliberated, discussed or decided unless it is on the agenda. (R.B. App. 3a). The very limited ability of a Board member to address an item not on the agenda by requesting it be placed on the agenda of a future meeting is obviously not contemplated by state law as in the same realm of the exercise of power and authority of a representative as discussion and deliberation of agenda items, because there are no controls associated with that potential action for the public's protection. The Board's policy which provides for restrictions is, therefore, also contrary to state law.

Board equates with the effectiveness of having an item reflecting one's constituents' concern on the agenda for discussion by the public and the Board in a public forum are basely dishonest. The United State's proposition appears to be that federal law tolerates the exclusion of minority voters in the governing process so long as there is a public recording of the rejection of hearing their interests by the majority representatives. Once an electoral structure is in place in a jurisdiction that allows for the election of a majority representative to a governing body, it is of no concern to the Voting Rights Act if that representative is suddenly hampered in bringing matters important to his voters before the body.

The United States explained that the February 27, 1987, letter to Victoria I.S.D. was only a request for additional

information to "clarify the question of coverage under the Voting Rights Act." (A.C. 4). The letter in fact unequivocally instructs the school district to comply with Sec. 5 requirements.[10]/

There is no question that the Department's letter to Victoria I.S.D. regarding the agenda preparation policy was compelled by more than the culmination of its Sec. 5 enforcement action against the district. The Department had intimate knowledge of all the same circumstances relied on by Appellants in their argument that the policy was adopted for the purpose of restricting Gutierrez's ability to represent her constituents.[11]/ Virtually

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[10] Such letters from the Department are, in fact, very unusual. In the case of Victoria I.S.D., the Department had sent two letters in a one year period on different changes.

[11] The Department had reviewed the school district's after the fact submission of the October 1985 bond election. It

all the school district's dirty laundry was before the Department when it determined that the original change in the agenda preparation policy was subject to Sec. 5 requirements.[12]/

The circumstances surrounding the adoption of the agenda preparation policy highlight its potential for discrimination. Doughtery County Board of Education v. White, 439 U.S. 45, 99 S.Ct. 368, 58 L.Ed. 2d 269 (1978). The change affecting voting effected by the policy may be subtle, but it is by no means innocuous or harmless, as the

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received information and calls from the minority community opposing the bond election, the district's unsatisfactory desegregation plan and the closing of minority schools. It had sued the school district after Victoria I.S.D. refused in 1986 to comply with Sec. 5 regarding the use of numbered places for at-large election of trustees.

12 The adopted policy provides an even clearer change in power and authority by granting the Board president discretionary control, a power not previously in effect.

United States contends. The discriminatory potential of the policy coupled with its impact on the political process, allowing discretionary exclusion from governmental deliberative processes based upon a single board member's enhanced power, brings the policy within the scope of Sec. 5. For the United States to contend otherwise is to ignore the intentions of Congress in the enactment of Sec. 5 as the means to promptly discover and enjoin new subterfuges to voting rights in covered jurisdictions. Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d (1969).[13]/

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[13] The United States recognizes a potential Fourteenth Amendment violation in the policy, but maintains there is no Sec. 5 violation. Based upon the history of constitutional litigation in Texas, the Department's default on its responsibilities under Sec. 5 in refusing to recognize these new subterfuges will open a flood gate of litigation in federal courts. One of the purposes of Sec. 5 is to protect the federal judiciary from that immense imposition.

CONCLUSION

Probable jurisdiction in this case should be noted.

Respectfully submitted,

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APPENDIX

VICTORIA ISD 235902

BOARD MEETINGS BE (LOCAL)

PLACE OF MEETING	Unless otherwise provided, Board meetings shall be held at the Education Center.
TIME OF MEETING	Regular meetings of the Board shall be held on the third Thursday of each month at 4:30 p.m., unless otherwise provided by the Board.
SPECIAL OR EMERGENCY MEETINGS	The time for special and emergency meetings of the Board shall be as stipulated in the notice for the meeting.
AGENDA PREPARATION	The agenda for meetings of the Board normally will closed at 5:00 p.m. on the seventh day preceding regular meetings and at noon on the third day preceding special meetings. Such requests shall be in writing and be sufficiently specific to inform other Board members and the public of the subject(s) to be discussed.

The agenda shall be prepared under the direction of the Superintendent with the advice and consent of the President of the Board. Requests for agenda items may be made by any Board member. Depending on the nature of the items submitted, the President may require the approval of two Board members to secure placement of that item on the agenda.

The Superintendent must be notified of all agenda items.

NOTICE TO MEMBERS

Members of the Board shall be given notice of regular and special meetings at least seventy-two hours prior to the scheduled time of the meeting and at least two hours prior to the time of an emergency meeting.

EXECUTIVE SESSION

Notice of all meetings shall provide for the possibility of a closed or executive session during an open meeting, as provided by law. (See BEC)

ORDER OF BUSINESS

The order of business for regular Board meetings

shall be as follows. The order of business may be changed by consent of a simple majority of all members present.

1. Roll call, establishment of quorum, call to order

2. Executive session(s), if any

3. Open forum

4. Reconvene in open meeting

5. Approval of Minutes of previous meeting(s)

6. Action items

7. Reports, discussion items

8. Adjournment

The Board may enter executive session at any time during the meeting, as permitted under the Open Meetings Act. (See BEC)

CALLED SPECIAL MEETINGS

The President of the Board shall call a special meeting at the President's discretion or on request by two or more members of

the Board.

CALLING EMERGENCY MEETINGS

The president shall call an emergency meeting when the President or two or more members of the Board determine that an emergency or urgent public necessity warrants the meeting.

Emergency meetings shall be called only for bonafide emergencies which cannot reasonably be postponed until a special or regular meeting.

RULES OF ORDER

The Board shall observe the parliamentary procedures as found in Robert's Rules of Order, Newly Revised, except as otherwise provided in Board procedural rules or by law. Procedural rules may be suspended at any Board meeting by majority vote of the members present.

VOTING

Voting shall be by voice vote or show of hands, as directed by the President. Any member may abstain from voting, and a member's vote or failure to vote shall be recorded upon that member's request. See BDAB (Local)

for the Board President's voting rights.

MINUTES

Board action shall be carefully recorded by the secretary of clerk; when approved, these minutes shall serve as the legal record of official Board actions. The written minutes of all meetings shall be approved by vote of the Board and signed by the President and the Secretary of the Board.

The official minutes of the Board shall be retained on file in the office of the Superintendent and shall be available for examination during regular office hours.

DISCUSSIONS AND LIMITATIONS

Discussions shall be addressed to the President of the Board and then the entire membership. Discussion shall be directed solely to the business currently under deliberation, and the Board President shall halt discussion that does not apply to the business before the Board.

The Board President shall also halt discussion if

the Board has agreed to a time limitation for discussion of an item, and that time limit has expired. Aside from these limitations, the President shall not interfere with debates so long as members wish to address themselves to an item under consideration.

ADOPTED: 11/20/86

Texas Open Meetings Act

Art. 6252-17. Prohibition on governmental bodies from holding meetings which are closed to the public

Definitions

Section 1. As used in the Act:

(a) "Meeting" means any deliberation between a quorum of members of a governmental body, or between a quorum of members of a governmental body and any other person, at which any public business or public policy over which the governmental body has supervision or control is discussed or considered, or at which any formal action is taken. It shall not be construed that the intent of this definition is to prohibit the gathering of members of the governmental body in numbers of a quorum or more for social functions unrelated to the public business which is conducted by the body or for attendance of regional, state, or national conventions or workshops as long as no formal action is taken and any discussion of public business is incidental to the functions, conventions, or workshops.

(b) "Deliberation" means a verbal exchange during a meeting between a quorum of members of a governmental body, or between a quorum of members of a governmental body and any other person, concerning any issue within the jurisdiction of the governmental body or any public business.

(c) "Governmental body" means any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members; and every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; and the governing board of every special district heretofore or hereafter created by law.

(d) "Quorum" unless otherwise defined by constitution, charter, rule or law applicable to such governing body, means a majority of the governing body.

Sec. 1 amended by Acts 1973, 63rd Leg., p. 45, ch. 31, Sec. 1, eff. Jan. 1, 1974; Sec. 1(a), (b) amended by Acts 1987, 70th Leg., ch. 549, Sec. 1, eff. Aug. 31, 1987.

Application of act

Sec. 2. (a) Except as otherwise provided in this Act or specifically permitted in the Constitution, every regular, special, or called meeting or session of every governmental body shall be open to the public; and no closed or executive meeting or session of any governmental body for any of the purposes for which closed or executive meetings or sessions are hereinafter authorized shall be held unless a quorum of the governmental body has first

been convened in open meeting or session for which notice has been given as hereinafter provided and during which open meeting or session the presiding officer has publicly announced that a closed or executive meeting or session will be held and identified the section or sections under this Act authorizing the holding of such closed or executive session.

Text of subsec. (r) as added by Acts 1987, 70th Leg., ch. 549, Sec. 2

(r) Nothing in this Act shall be construed to require a quorum of the members of a governmental body to confer with an employee or employees of the governmental body in an open meeting where such conference is for the sole purpose of receiving information from the employee or employees or to ask questions of the employee or employees; provided, however, that no discussion of public business or agency policy that affects public business shall take place between the members of the governmental body during the conference.

Notice of meetings

Sec. 3A. (a) Written notice of the date, hour, place, and subject of each meeting held by a governmental body shall be given before the meeting as prescribed by this section. The requirement for notice prescribed by this section does not apply to matters about which specific factual information or a recitation of existing policy is furnished in response to an inquiry made at such meeting, whether such inquiry is made by a member of the general

public or by a member of the governmental body. Any deliberation, discussion, or decision with respect to the subject about which inquiry was made shall be limited to a proposal to place such subject on the agenda for a subsequent meeting of such governmental body for which notice has been provided in compliance with this Act.

(e) A school district shall have a notice posted on a bulletin board located at a place convenient to the public in its central administrative office and shall give notice by telephone or telegraph to any news media requesting such notice and consenting to pay any and all expenses incurred by the school district in providing special notice.

(h) Notice of a meeting must be posted in a place readily accessible to the general public at all times for at least 72 hours preceding the scheduled time of the meeting, except that notice of a meeting of a state board, commission, department, or officer having statewide jurisdiction, other than the Industrial Accident Board or the governing board of an institution of higher education, must be posted by the Secretary of State for at least seven days preceding the day of the meeting. In case of emergency or urgent public necessity, which shall be clearly identified in the notice, it shall be sufficient if the notice is posted two hours before the meeting is convened. Any public official or person who is designated or authorized to post notices of meetings by the governmental body in accordance with Section 3A of this Act shall post the notice taking at face value the reason for the emergency as stated by the

governmental body. Cases of emergency and urgent public necessity are limited to imminent threats to public health and safety or reasonably unforeseeable situations requiring immediate action by the governmental body. Provided further, that where a meeting has been called with notice thereof posted in accordance with this subsection, additional subjects may be added to the agenda for such meeting by posting a supplemental notice, in which the emergency or urgent public necessity requiring consideration of such additional subjects is expressed. In the event of an emergency meeting, or in the event any subject is added to the agenda in a supplemental notice posted for a meeting other than an emergency meeting, it shall be sufficient if the notice or supplemental notice is posted two hours before the meeting is convened, and the presiding officer or the member calling such emergency meeting or posting supplemental notice to the agenda for any other meeting shall, if request therefor containing all pertinent information has previously been filed at the headquarters of the governmental body, give notice by telephone or telegraph to any news media requesting such notice and consenting to pay and all expenses incurred by the governmental body in providing such special notice. The notice provisions for legislative committee meetings shall be as provided by the rules of the house and senate.

Sec. 3A amended by Acts 1971, 62nd Leg., p. 1789, ch. 527, Sec. 1, eff. June 1, 1971; Acts 1973, 63rd Leg., p. 47, ch. 31, Sec. 3, eff. Jan. 1, 1974; Sec. 3A, subsec. (h)

amended by Acts 1975, 64th Leg., p. 968, ch. 367, Sec. 1, eff. Sept. 1, 1975; Sec. 3A, subsec. (a) amended by Acts 1977, 65th Leg., p. 1674, ch. 659, Sec. 1, eff. Aug. 29, 1977; Sec. 3A, subsec. (e) amended by Acts 1981, 67th Leg., p. 2231, ch. 529, Sec. 1, eff. Sept. 1, 1981; Sec. 3A(a), (h) amended by Acts 1987, 70th Leg., ch. 549, Sec. 5, eff. Aug. 31, 1987.